

THE GOVERNMENT OF MALAYSIA v. IMEJ WARISAN
SDN BHD

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: S-01(W)-365-11-2015]
8 DECEMBER 2017

CONTRACT: *Building contract – Interim certificates – Extensions of time – Claim for late payment interests – Claim for damages for wrongful deduction of liquidated ascertained damages ('LAD') – Claim for loss of expense – Whether claimant entitled to claim for late payment interest under contract – Whether Government entitled to impose LAD against claimant*

Pursuant to a contract dated 18 November 2005, the appellant ('the defendant') appointed the respondent ('the plaintiff') to design and build a project for the contract price of RM96,865,377. The contract was for a period of 30 months, calculated from 26 August 2004 and due for completion on 25 February 2007. A total of four certificates of delay and extensions of time ('EOT') for the completion of the project were granted to the plaintiff. The plaintiff then sued the defendant for (i) late payment interest of RM1,511,386.84; (ii) damages in the sum of RM685,225.71 for wrongful deduction of liquidated ascertained damages ('LAD') of 27 days; and (iii) damages of RM3,420,320.96 for losses and expenses suffered by the plaintiff in respect of the delay in the completion of the project. The plaintiff's claim for late payment interest related to interim certificates no. 2 to 39 which were paid after the timeline of 30 days for due payment pursuant to cl. 50.3 of the contract. The plaintiff's claim for damages for wrongful deduction of LAD of 27 days was predicated on the fact that there were no grounds for imposing LAD as the delay was caused by the Beaufort District Council in the issuance of the occupation certificate. After a full trial, the High Court Judge ('the HCJ') allowed the plaintiff's claim and ordered, *inter alia*, that the defendant (i) pay the plaintiff late payment interest of RM1,021,932.18 together with interest at 4% per annum from date of judgment until realisation; (ii) was entitled to impose LAD of 24 days only amounting to RM609,089.52 and not RM685,225.71 and to refund to the plaintiff the difference of RM76,136.19; and (iii) dismissed the plaintiff's claim for RM3,420,320.96 for losses and expenses. Dissatisfied, the defendant appealed against the whole of the decision whilst the plaintiff cross-appealed against part of the decision relating to the late payment interest and deduction of the LAD. The issues that arose for determination, *inter alia*, were (i) whether the plaintiff was entitled to late payment interest under cl. 50.4 of the contract; and (ii) whether the defendant was entitled to impose LAD amounting to RM685,225.17 against the plaintiff.

A Held (allowing defendant's appeal with costs; dismissing plaintiff's cross-appeal)

Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

- B** (1) The HCJ appeared to have considered the evidence of PW1 who said that he signed the contract and agreed to the waiver of late payment interest under cl. 50.4 subject to the implied term that after 31 March 2006, the plaintiff would be entitled to claim for interest for late payment and any loss and expenses caused by the delay in payment. In so doing, the HCJ had taken into account the plaintiff's interpretation of cl. 50.4. As such, the HCJ opined that cl. 50.4 entitled the plaintiff to claim for loss, expense, interest or financing charges incurred against the defendant for delay or late payment on any interim certificate issued after 31 March 2006. Clause 50.4 was clear and free from ambiguity. This was not a situation where the court was called upon to make a choice between two meanings. The HCJ ought to have disregarded the evidence of PW1 which was declaratory of subject intent. On the totality of the evidence, there was no justification for the importation of the implied term in order to give effect to the bargain of the parties or add to business efficacy. (paras 29 & 30)
- C**
- E** (2) The computation of the 30-day time period for the payment of interim certificates was calculated from the date the interim certificate was issued by the Project Director ('PD'). As such, the interim certificates in question were paid within the 30-day timeline. Accordingly, the question of interest chargeable on late payment was a non-issue. (para 31)
- F** (3) The LAD was only imposed for the period following the expiry of EOT4. The delay in the issuance of the occupation certificate by the Beaufort District Council was not a material factor to be considered because (i) the completion date was defined under the contract as the date of certification of practical completion by the PD pursuant to cl. 41.2 of the contract; and (ii) as the contract was a design and build contract, it was the plaintiff's obligation to obtain the occupation certificate. The HCJ erred in finding that the date of completion should be based on the date of the occupation certificate. Accordingly, the LAD due to the defendant should be calculated on the basis of 27 days. (para 32)
- G**
- H** (4) The plaintiff's cross-appeal related to (i) the quantum of the late payment interest; and (ii) the award of LAD. Item (ii) was dismissed in light of the decision on LAD. Item (i) was dismissed in light of the decision that the plaintiff was not entitled to claim for late payment interest under the contract. (para 33)
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Bahasa Malaysia Headnotes

Selaras dengan kontrak bertarikh 18 November 2005, perayu ('defendan') telah melantik responden ('plaintif') untuk mereka bentuk dan membina sebuah projek untuk harga kontrak sebanyak RM96,865,377. Kontrak tersebut adalah untuk tempoh 30 bulan yang dikira dari 26 Ogos 2004 dan hendaklah disiapkan pada 25 Februari 2007. Sebanyak empat sijil kelewatan dan lanjutan masa ('EOT') untuk menyelesaikan projek telah diberi kepada plaintif. Plaintif kemudian memulakan tindakan guaman terhadap defendan bagi (i) faedah bayaran lewat sebanyak RM1,511,386.84; (ii) ganti rugi sebanyak RM685,225.71 untuk potongan ganti rugi jumlah tertentu ('LAD') sebanyak 27 hari; dan (iii) ganti rugi sebanyak RM3,420,320.96 untuk kerugian dan perbelanjaan plaintif berkenaan dengan kelewatan dalam menyiapkan projek tersebut. Tuntutan plaintif untuk pembayaran faedah lewat berkaitan dengan sijil interim no. 2 hingga 39 yang dibayar selepas tempoh 30 hari bayaran menurut kl. 50.3 kontrak. Tuntutan plaintif untuk ganti rugi bagi potongan secara salah LAD untuk 27 hari adalah berdasarkan fakta bahawa tidak ada alasan untuk mengenakan LAD kerana kelewatan disebabkan oleh Majlis Daerah Beaufort dalam pengeluaran Sijil Penghunian. Selepas perbicaraan penuh, Hakim Mahkamah Tinggi ('HMT') membenarkan tuntutan plaintif dan memerintahkan, antara lain, agar defendan (i) membayar plaintif faedah bayaran lewat sebanyak RM1,021,932.18 bersama-sama dengan faedah pada 4% setahun dari tarikh penghakiman hingga tarikh pembayaran; (ii) berhak mengenakan LAD untuk 24 hari sahaja yang berjumlah sebanyak RM609,089.52 dan bukan RM685,225.71 dan membayar balik kepada plaintif perbezaan sebanyak RM76,136.19; dan (iii) menolak tuntutan plaintif untuk kerugian dan perbelanjaan sebanyak RM3,420,320.96. Terkilan, defendan merayu terhadap keseluruhan keputusan sementara plaintif membuat rayuan silang terhadap sebahagian keputusan yang berkaitan dengan faedah bayaran lewat dan potongan LAD. Isu-isu yang dibangkitkan untuk pertimbangan, antara lain, adalah (i) sama ada plaintif berhak mendapat faedah bayaran lewat berdasarkan kl. 50.4 kontrak; dan (ii) sama ada defendan berhak mengenakan LAD berjumlah RM685,225.17 terhadap plaintif.

Diputuskan (membenarkan rayuan defendan dengan kos; menolak rayuan balas plaintif)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

- (1) Hakim Mahkamah Tinggi nampaknya telah mempertimbangkan bukti PW1 yang mengatakan bahawa dia telah menandatangani kontrak dan bersetuju untuk mengetepikan bayaran lewat bawah kl. 50.4 tertakluk pada terma tersirat bahawa selepas 31 Mac 2006, plaintif akan berhak menuntut faedah bayaran lewat dan apa-apa kerugian dan perbelanjaan

- A yang disebabkan oleh kelewatan bayaran. Dengan itu, HMT telah mengambil kira tafsiran kl. 50.4. Oleh itu, HMT berpendapat bahawa kl. 50.4 memberi hak kepada plaintif menuntut kerugian, perbelanjaan, faedah atau bayaran pembiayaan yang dikenakan terhadap defendan untuk kelewatan atau bayaran lewat pada mana-mana sijil interim yang dikeluarkan selepas 31 Mac 2006. Klausa 50.4 adalah jelas dan bebas daripada kekaburan. Ini bukan situasi mahkamah terpanggil membuat pilihan antara dua makna. Hakim Mahkamah Tinggi sepatutnya mengabaikan keterangan PW1 yang merupakan pengisytiharan subjek niat. Berdasarkan keseluruhan keterangan, tidak ada alasan mengimport istilah tersirat untuk memberi kesan kepada tawar-menawar pihak-pihak atau menambah keberkesanan perniagaan.
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- (2) Pengiraan tempoh 30 hari untuk pembayaran sijil interim dikira dari tarikh sijil interim yang dikeluarkan oleh Pengarah Projek ('PD'). Oleh itu, sijil interim yang berkenaan telah dibayar dalam tempoh 30 hari. Sehubungan itu, persoalan faedah yang dikenakan pada bayaran lewat tidak menjadi isu.
- D
- (3) Ganti rugi jumlah tertentu hanya dikenakan untuk tempoh selepas tamatnya EOT4. Kelewatan dalam pengeluaran sijil penghunian oleh Majlis Daerah Beaufort bukan faktor penting untuk dipertimbangkan kerana (i) tarikh siap ditakrifkan bawah kontrak sebagai tarikh pengesahan penyempurnaan praktikal oleh PD menurut kl. 41.2 kontrak; dan (ii) oleh kerana kontrak adalah kontrak reka bentuk dan pembinaan, ini adalah kewajipan plaintif untuk mendapatkan sijil penghunian. Hakim Mahkamah Tinggi terkhilaf dalam menentukan bahawa tarikh siap hendaklah berdasarkan tarikh sijil penghunian. Oleh itu, LAD yang harus dibayar oleh defendan harus dikira berdasarkan 27 hari.
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- (4) Rayuan balas plaintif berkaitan dengan (i) kuantum faedah bayaran lewat; dan (ii) award LAD. Perkara (ii) ditolak berdasarkan keputusan LAD. Perkara (i) ditolak dengan mengambil kira keputusan bahawa plaintif tidak berhak menuntut bayaran lewat bawah kontrak.
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Case(s) referred to:

Attorney General of Belize v. Belize Telecom Limited [2009] UKPC 10 (*refd*)

Bank of Credit and Commerce International SA v. Munawar Ali [2001] 2 WLR 735 (*refd*)

H *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 FC (*refd*)

Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98 (*refd*)

Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 1 LNS 37 PC (*refd*)

Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 (*refd*)

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- Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211 CA (*refd*) A
- Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 4 CLJ 217 CA (*refd*)
- SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177 FC (*refd*)
- For the appellant - Ahmad Terrirudin Mohd Salleh & Azlina Mahmud; SFCs* B
For the respondent - Henri PS Cheu & Sean Liang; M/s Cheu Adnan & Razi
- [Editor's note: *For the High Court judgment, please see Imej Warisan Sdn Bhd v. The Government Of Malaysia* [2015] 1 LNS 1202 (overruled in part).]
- Reported by Sandra Gabriel* C

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

- [1] Pursuant to a design and build contract entered into between Imej Warisan Sdn Bhd (the plaintiff in the court below) and the Government of Malaysia (the defendant in the court below), the plaintiff sued the defendant for (i) late payment interest of RM1,511,386.84; (ii) damages in the sum of RM685,225.71 for wrongful deduction of liquidated ascertained damages ('LAD') of 27 days; and damages of RM3,420,320.96 for loss and expense suffered by the plaintiff in respect of the delay in the completion of the project. D
- [2] After a full trial at the Kota Kinabalu High Court, the learned judge allowed the plaintiff's claim and made the following orders, *inter alia*: E
- a) The defendant to pay the plaintiff late payment interest of RM1,021,932.18 together with interest at 4% per annum from date of judgment until realisation; F
- b) The defendant is entitled to impose LAD of 24 days only amounting to RM609,089.52 and not RM685,225.71 and the defendant to refund to the plaintiff the difference of RM76,136.19; and G
- c) Plaintiff's claim for RM3,420,320.96 for loss and expense is dismissed.
- [3] Dissatisfied, the defendant appealed against the whole of the decision whilst the plaintiff cross-appealed against part of the decision relating to the late payment interest and deduction of the LAD. H
- [4] On 17 January 2017 after hearing of submission of counsel for the parties, we arrived at a unanimous decision to allow the defendant's appeal and dismiss the plaintiff's cross-appeal. We now set out our reasons below. In this judgment, the parties shall be referred to as they were in the court below. I

A Brief Account Of The Salient Facts

[5] Pursuant to a contract dated 18 November 2005, the defendant appointed the plaintiff to design and build the project known as ‘Cadangan Merekabentuk, Membina dan Menyiapkan Sekolah Menengah Teknik Beaufort, Sabah dan 150 unit Kuarters Institusi Pendidikan’ for the contract price of RM96,865,377.

[6] The contract was for a period of 30 months calculated from 26 August 2004 and due for completion on 25 February 2007. Oscabumi Sdn Bhd was appointed as the project management consultant for the project (‘the PMC’).

[7] A total of four certificates of delay and extensions of time (EOT) for the completion of the project were granted to the plaintiff. The particulars are as follows:

EOT1	180 days – 25.2.2007 to 24.8.2007
EOT2	125 days – 24.8.2007 to 27.12.2007
EOT3	270 days – 27.12.2007 to 23.6.2008
EOT4	120 days – 23.6.2008 to 21.10.2008

[8] The occupation certificate was issued by the Beaufort District Council on 12 February 2009. According to the certificate of practical completion, the project was completed on 16 February 2009.

Plaintiff’s Claim

[9] The plaintiff’s claim for late payment interest relates to interim certificates no. 2 to 39 which were paid after the timeline of 30 days for due payment pursuant to cl. 50.3 of the contract.

[10] The plaintiff’s claim for damages for wrongful deduction of LAD of 27 days is predicated on the fact that there are no grounds for imposing LAD. The delay was caused by the Beaufort District Council in the issuance of the occupation certificate.

[11] The plaintiff’s claim for damages in the sum of RM3,420,320.96 due to late payment of the interim certificates is in respect of financial charges (RM1,363,419.26) and loss and expense incurred (RM2,083,901.70) due to the delay of 12 months.

Findings Of The High Court

[12] The findings of the learned judge on the three principal issues may be summarised as follows:

- a) Whether the plaintiff is entitled to late payment interest under cl. 50.4 of the contract? A
- i. Three of the four EOT showed that the delays were due to circumstances beyond the control of the plaintiff. The defendant had agreed with the reasons by giving EOT1, 2 and 4. EOT3 was due to late approval and instruction from KPM. Up to 21 October 2008, the delays were not due to the fault of the plaintiff which would subject the plaintiff to penalties; B
- ii. The defendant's contention that the late issuance of payment certificates was caused by the plaintiff's delay or failure to complete the works in accordance with the schedule could not be sustained. There was no evidence that the late issuance of payment certificates was caused by the plaintiff's delay or failure to complete the works in accordance with the schedule; C
- iii. The defendant's right to defer payment under cl. 50.4 was subject to the cut-off date of 31 March 2006. The defendant could not defer payment on any interim certificate issued after 31 March 2006; and D
- iv. Reading cl. 50.4, the plaintiff is entitled to claim for loss, expense, interest or financing charges for late payment on interim certificates; E
- b) Whether the defendant is entitled to impose LAD amounting to RM685,225.17 against the plaintiff? E
- i. The date of completion should be based on the occupation certificate and not on the certificate of practical completion; and
- ii. There was a delay of completion of 24 days and not 27 days as contended by the defendant. As such, the LAD amounted to RM609,089.52 and not RM685,225.71. F
- c) Whether the plaintiff is entitled to damages of RM3,420,320.96 arising from the late payment of the contract sum? G
- i. The claim for financial charges of RM1,363,419.26 is not proven as the plaintiff did not plead and did not lead any evidence on its financial position; and
- ii. The claim for loss and expense incurred of RM2,083,901.70 is not proved as the plaintiff did not produce any documentary evidence to substantiate its claim. H

Submission Of Parties

[13] At the hearing of the appeal, learned Senior Federal Counsel (SFC) advanced two main grounds. The first relates to late payment interest and the second to LAD. On the first ground, learned SFC argued that notwithstanding cl. 50.3, the time for payment of interim certificates was deferred under cl. 50.4 which reads as follows: I

- A Notwithstanding clauses 50.1 to 50.3 above, the Government reserves the right to defer payment to the Contractor on any Interim Certificate which has been or to be issued by the P.D. for a period of up to but no later than 31 March 2006. In the event that the Government exercises this right, the Contractor shall waive all rights to claim against the Government for any payment in respect of such Interim Certificate and
- B any loss, expense, interest, financing charges of whatsoever in connection therewith.

[14] Learned SFC argued that cl. 50.4 is silent on late payment interest after 31 March 2006 and that as such there is nothing to support the plaintiff's contention that it was the intention of the parties to provide for late payment interest. Reference was made to DW1's evidence that cl. 50.4 was inserted because the plaintiff was prepared to execute the project without having received payment and to wait until the 9th Malaysia Plan.

[15] As such, it was argued that in construing cl. 50.4 to give the plaintiff the right to claim late payment interest, the learned judge had erred as he had impliedly imported a new term even though the contract is clear and unambiguous. In support of his argument, learned SFC cited *Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 4 CLJ 217; [2008] 5 MLJ 157 (CA); *Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211; [2016] MLJU 320 (CA).

[16] Further, learned SFC argued that the learned judge failed to determine the date of honouring interim certificate pursuant to cl. 50.3(c) shall take effect from the date the Project Director ('PD') signed on the interim certificate until the payment date and not from the date the PMC issued the payment claim to the defendant. The role of the PMC is only to recommend payment; the PMC is not authorised to certify payment. The schedule entitled "Recalculation of the Schedule of the Interim Certificate Payment" shows that payments on the interim certificates were made within 30 days. Further, the evidence of DW2 shows that all payments on interim certificates were made within 30 days as provided under cl. 50.3.

[17] Secondly, learned SFC argued that under cl. 41.2 of the contract, completion occurs when the whole of the works have reached practical completion to the satisfaction of the PD. As such, the learned judge erred in holding that the completion should be based on the occupation certificate and not on the certificate of completion.

[18] In this case, learned SFC submitted that LAD was only imposed for the delay in completing the works after EOT4 expired from 21 October 2009 to 16 February 2009 (117 days). However, pursuant to cl. 14 of the Government's Circular Bil. 8/1995, the plaintiff was eligible to be given 90 days exemption from LAD (22 October 2008 to 19 January 2009). Thus,

the plaintiff was only imposed LAD for 27 days (117-90 days) for the period from 21 January 2009 to 16 February 2009 amounting to RM685,225.71 calculated at RM25,378.73 per day. The learned judge erred in calculating the number of days up to the date of the issuance of the occupation certificate which is inconsistent with cl. 41.2 of the contract which provides the date of the certificate of practical completion.

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[19] In his short reply, learned counsel for the plaintiff argued that the learned judge was correct in construing cl. 50.4 together with cl. 50.3. The plaintiff had the implied right to claim for loss, expense, interest or financing charges for late payment on any interim certificate issued after 31 March 2006. There was no evidence to show that the late issuance of payment certificates was caused by the plaintiff's delay or failure in completing the works in accordance with the schedules.

C

[20] Learned counsel also argued that the defendant cannot rely on cls. 50.2(c) and 50.3(c) of the contract because the signing of the interim certificates was purposely delayed by the PD due to lack of funds and that the defendant's "Recalculation of the Schedule of the Interim Certificate Payment" could not be relied on because some of the interim certificates did not have the signing date by the PD and some were missing altogether.

D

[21] Learned counsel also argued that the learned judge was correct to find that the completion date should be the date of the occupation certificate which signifies that the project was completed and ready for occupation. The defendant should not be allowed to rely on cl. 41.2 of the contract.

E

[22] On the plaintiff's cross-appeal, learned counsel argued that whilst the learned judge was correct in finding that the plaintiff was entitled to late payment interest, the learned judge erred in adopting the defendant's "Recalculation of the Schedule of the Interim Certificate Payment" and adding on interim certificates nos. 4 and 5 instead of adopting the plaintiff's "Recalculation Schedule". The correct amount should be RM1,094,742.93.

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[23] Lastly, learned counsel argued that the learned judge ought not to have allowed the defendant to deduct any LAD because the delay in obtaining the occupation certificate from the Beaufort District Council was beyond the control of the plaintiff.

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Decision

H

[24] We will deal with the first issue relating to late payment interest which turns on the interpretation of cl. 50.4 of the contract. It has oft been said that where the court is called upon to interpret a contract, it will do so in a sensible fashion (see *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37). In this connection, it is also instructive to consider Lord Steyn's statement in *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771:

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- A In determining the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial transaction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the
- B reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. In contradistinction to this modern approach, Lord Greene M.R.'s judgment in *Hankey v. Claverling* [1942] 2 KB 326 is rigid and formalistic.
- C [25] Thus, while individual contracts will fall to be interpreted in accordance with their own terms, it is a useful guide to construction that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the essence of the contract. Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines: *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 FC at 296. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. (see *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98). As Lord Clyde said in *Bank of Credit and Commerce International SA v. Munawar Ali* [2001] 2 WLR 735:
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- F The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their
- G minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. *The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.* (emphasis added)
- H
- I [26] In *Attorney General of Belize v. Belize Telecom Limited* [2009] UKPC 10, when delivering the Advice of the Board, Lord Hoffmann said:

The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument. (emphasis added)

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[27] In *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464, the Federal Court elucidated the settled principles on the court's function to interpret and apply the contract which the parties have entered into. At p. 198 (CLJ); p. 486 (MLJ) of the judgment, Zainun Ali FCJ speaking for the Federal Court said:

D

[45] As a relevant addendum, the relationship between interpretation and implication are considered in this discussion of the principles of construction. According to Lord Hoffman in *Attorney General of Belize v. Belize Telecom Limited* [2009] UKPC 10; [2009] 1 WLR 1988 (PC) this characterisation can be traced back to the speech of Lord Pearson in *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 1 WLR 602 (HL), where his Lordship had warned:

E

The court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. *The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable. An unexpressed term can be implied if and only if courts find that the parties must have intended that term to form part of their contract.* (emphasis added)

F

G

[28] In *Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211; [2016] MLJU 320, the Court of Appeal expressed the court's function in interpreting a contract in the following words at para [34]:

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[34] Accordingly, when a court is called upon to interpret a document, it looks at the language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve into the intricacies of the human mind to disclose one's undisclosed intention, but only to take the meaning of the words used by him, that is to say, his expressed intentions: see *Kamla Devi v. Takhmil* AIR 1964 Vol 51 a Supreme Court of India decision at page 386.

I

A [29] In his written judgment, the learned judge accepted the fact that there is no provision in the contract which allows for the imposition of interest or any other claims for late payment. However, the learned judge went on to opine that in order “to give effect to the bargain of the parties and to business efficacy according to their intention in the contract” cl. 50.4 did not specifically take away the plaintiff’s right to claim for any loss, expense, interest or financing charges. The learned judge also appeared to have considered the evidence of PW1 who said that he signed the contract and agreed to the waiver of late payment interest under cl. 50.4 subject to the implied term that after 31 March 2006 the plaintiff would be entitled to claim for interest for late payment and any loss and expenses caused by the delay in payment. In so doing, the learned judge had taken into account the plaintiff’s interpretation of cl. 50.4. As such, the learned judge opined that cl. 50.4 entitled the plaintiff to claim for loss, expense, interest or financing charges incurred against the defendant for delay or late payment on any interim certificate issued after 31 March 2006.

D [30] In our view, cl. 50.4 is clear and free from ambiguity. We do not think this is a situation where the court is called upon to make a choice between two meanings. The learned judge ought to have disregarded the evidence of PW1 which was declaratory of subject intent. On the totality of the evidence on record, we do not see any justification for the importation of the implied term in order to give effect to the bargain of the parties or add to business efficacy.

F [31] We also agree with the submission of learned SFC that the computation of the 30-day time period for the payment of interim certificates is calculated from the date the interim certificate is issued by the PD. As such, the evidence shows that the interim certificates in question were paid within the 30-day timeline. Accordingly, the question of interest chargeable on late payment is a non-issue.

G [32] We now turn to the LAD issue. We have perused the appeal record and find ourselves in complete agreement with the submission of learned SFC. Altogether, four EOTs were granted to the plaintiff from 21 October 2008 to 16 February 2009 (a total of 117 days). LAD was only imposed for the period following the expiry of EOT4. We do not think that the delay in the issuance of the occupation certificate by the Beaufort District Council is a material factor to be considered because (i) the completion date is defined under the contract as the date of certification of practical completion by the PD pursuant to cl. 41.2 of the contract and (ii) as the contract is a design and build contract, it was the plaintiff’s obligation to obtain the occupation certificate. We are constrained to hold that the learned judge erred in finding that the date of completion should be based on the date of the occupation certificate. Accordingly, the LAD due to the defendant should be calculated on the basis of 27 days as submitted by learned SFC in preceding para. [18].

[33] The plaintiff's cross-appeal relates to (i) the quantum of the late payment interest and (ii) the award of LAD. In the light of our decision on LAD above, we would dismiss item (ii). We would also dismiss item (i) in the light of our decision that the plaintiff is not entitled to claim for late payment interest under the contract.

[34] For the foregoing reasons, the defendant's appeal is allowed. The decision of the learned judge allowing the plaintiff's claim for late payment interest is set aside. The decision of the learned judge allowing LAD is varied by substituting the amount of RM609,089.52 with RM685,225.17. The plaintiff's cross-appeal is dismissed. We awarded costs of RM10,000 to the defendant.

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